A LAWSUIT AT YOUR FINGERTIPS: WEBSITE COMPLIANCE WITH THE ADA

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Executive summary: There's a new target for Title III ADA claims—corporate websites. The federal appeals courts are divided over how Title III applies to corporate websites, and the lack of regulatory guidance makes compliance with Title III a bit of a shot in the dark. Hard as it is to navigate, companies should consider making strides now towards ensuring their company websites are accessible to internet users with visual, hearing, and other impairments.

"When the ADA was enacted in 1990, the Internet as we know it today . . . did not exist."

To battle what was perceived as rampant discrimination against disabled individuals, Congress passed the Americans with Disabilities Act of 1990 (ADA). As amended in 2008, the ADA prohibits discrimination in employment (Title I), public services (Title II), and public accommodations (Title III). Title III specifically aims to ensure that disabled individuals have the same opportunity as the nondisabled to access the "goods, services, facilities, privileges, advantages, or accommodations" offered by places of public accommodation. Private businesses covered under Title III include, among others, places of lodging, restaurants and bars, stadiums and other places of entertainment, bakeries and grocery stores, and clothing stores and shopping centers. To be clear, Title III contains no specific references to "websites," nor is a "website" commonly thought of as a "public accommodation" per se. Nonetheless, the twenty-first century has transformed the notion of a "website" from simply a marketing tool to an extension of a business that is covered by the ADA and that must provide internet users with a meaningful opportunity to access the business.

The Eleventh Circuit's Take on Title III's Application to Websites.

The federal district courts comprising the Eleventh Circuit are less favorable forums for bringing Title III ADA suits based on alleged website inaccessibility. When Title III cases began to pop up in Florida, the pioneer litigants focused their arguments on likening a "website" to a "public accommodation." Those arguments were not well-taken. Wary of misinterpreting the congressional intent and the "unambiguous" statutory language, Florida district courts understood "public accommodations" to mean physical, concrete structures—which "websites" were decidedly not. Instead of outright equating cyberspace with a physical place, the Eleventh Circuit suggested in *Access Now, Inc. v. Sw. Airlines Co.*, 385 F.3d 1324 (11th Cir. 2004), that *linking* a "website" to an existing geographic location might have been the winning approach. At the trial level, the *Access Now* plaintiffs—a non-profit advocacy organization for the disabled and a blind individual—argued that Southwest Airlines' website excluded blind persons from goods and services offered on the airline's website in violation of the ADA. The district court found that Title III did not contemplate including websites in the definition of a "place of public accommodation" and dismissed the case, commenting: "To expand the ADA to cover 'virtual' spaces would be to create new rights without well-defined standards." On appeal, Access Now abandoned the unsuccessful argument and maintained, for the first time, that Southwest's travel service was a place of public accommodation operated in part through the airline's website and to which www.southwest.com was connected. The Eleventh Circuit implied that argument's potential success but declined to entertain Access Now's new theory for the first time on appeal. However,

the Eleventh Circuit recognized that "[t]he internet is transforming our economy and culture, and the question [of] whether it is covered by the ADA . . . is of substantial public importance," thereby leaving the possibility for future successful lawsuits—under the right circumstances.

The right circumstances may exist where the disabled plaintiff cannot physically access the location but could access the website only. For example, one can imagine that a bed-ridden, visually impaired internet user would not have access to a ticket counter other than through an airline's website. In less extreme scenarios, Florida district courts likely will continue to insist that Title III plaintiffs demonstrate a "nexus" between a website—"cyberspace located in no particular geographical location"—and a specific, physical, concrete space, the access to which the website has prevented. *See Kidwell v. Florida Comm'n on Human Relations*, 2017 WL 176897, at *5 (M.D. Fla. Jan. 17, 2017).

Why Should Your Company Care?

Websites have no geographic location. And indeed, the Eleventh Circuit's approach is not the only one a company maintaining a website and/or doing business outside of Florida has to worry about. Courts in other federal circuits have found that Title III is not limited to "brick and mortar" structures. For example, in 2012, a lower court within the First Circuit found that Netflix—a website that delivered instant streaming of audiovisual content without accompanying closed-captioning—was a "public accommodation" under Title III. Decisions coming out of the Second and Seventh Circuits have also indicated that a website may be considered a place of public accommodation in and of itself and that a disabled plaintiff is not required to show a "nexus" to any physical location. Due to more lenient interpretations of Title III, large companies have in recent years witnessed increasing numbers of class action lawsuits. For example, Ace Hardware, Aeropostale, Bed Bath & Beyond, J.C. Penney, Sprint, Home Depot, H&R Block, and BarBri are among the companies that have found themselves facing the transforming landscape of the ADA. Considering the border-transcending nature of the internet, virtually no company based or operating in Florida that maintains and advertises its goods or services on a website is safe from the possibility of a potential class action lawsuit.

Department of Justice's Seven-Year-Long Effort to Amend Regulations Implementing Title III

In 2010, the U.S. Department of Justice (DOJ) aspired to amend the regulations implementing Title III to establish requirements and technical standards for "making the goods, services, facilities, privileges, accommodations, or advantages offered by public accommodations via the Internet, specifically at sites on the World Wide Web . . . , accessible to individuals with disabilities." The need for revised regulations was underscored by the fact that websites offer consumers better selection and pricing than conventional "brick-and-mortar" storefronts; that schools deliver academic programs and classroom instruction through websites; that the internet plays a significant role in transforming the way individuals socialize and seek out entertainment; that websites are depositories of information—"from games and music to news and videos"; and that the internet allows individuals to obtain healthcare information. For individuals with disabilities to equally benefit from and participate in all aspects of American economic and civil life, the DOJ maintained, company websites should be made accessible.

Seven years later, the DOJ's aspiration has not yet materialized. In November 2015, the DOJ moved its anticipated rulemaking to the "long-term action" list for 2018, explaining the extended deadline by the need to further evaluate the web accessibility obligations on public accommodations and to further consider the standards for compliance. That the rulemaking would materialize in 2018, however, became dubious on January 30, 2017, when President Donald Trump signed an Executive Order reducing regulation and controlling regulatory costs. In the name of prudency and financial responsibility in the expenditure of funds, the order required, in part, that "the cost of planned regulations be prudently managed and controlled through a budgeting process." With a stroke of a pen, the future of amendments to the regulations implementing Title III concerning website accessibility and setting forth technical standards has become uncertain, at best.

In the meantime, however, companies can take certain steps to deal with the topic of website accessibility. For example, building websites or modifying existing websites to enable conversion of written content to spoken words, embedding alternative text to posted images, resizing text and providing subtitles are some simple steps available to protect a company from liability based on a website's potential noncompliance with Title III. More importantly, reassessing the company website's compliance with the ADA will not only help maintain the existing customer base, at least some of whom may suffer from some type of visual or hearing impairments, but also to attract new customers.

***Conclusion*:** The direction the ADA Title III jurisprudence will ultimately take is not yet clear. The divided federal circuits and the uncertain timing for any definite regulatory guidance from the DOJ make it difficult to propose a winning formula for compliance. Regardless, doing nothing is not an option. The transcending nature of the internet exposes a business to liability irrespective of the geographic location. Companies are best advised, for starters, to temporarily repair and, in the long run, to develop more permanent solutions to known or potential problems with their corporate websites—both to shield against Title III litigation and to attract customers who may otherwise never get to enjoy the company's goods or services.

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[i] If you have any questions about your company's potential exposure to lawsuits under Title III of the ADA, please feel free to contact Tracey K. Jaensch, (813) 261-7815 or tjaensch@fordharrison.com, or Viktoryia Johnson, (813) 261-7814 or vjohnson@fordharrison.com.